
INTERNATIONAL HUMAN RIGHTS LAW, WOMEN'S RIGHTS AND THE INTERVENTION

by Megan Davis

The current debate about the Northern Territory legislative package focuses on the Federal Government's categorisation of the Intervention as a regime of 'special measures', that is, that the measures adopted are necessary to create substantive equality for Aboriginal people living in situations of disadvantage and social dysfunction. A central concern for opponents of the Intervention is that the Government failed to conduct any community consultation before the measures were introduced. In response, the Government's position is that affected communities were in a state of crisis at the time of implementation, making it impossible to effectively carry out such consultation.

Of course international law, like domestic law, involves competing rights and interpretations. And the public debate surrounding the Intervention has evolved into a contest between competing ideas; that is, between collective rights and individual rights, or between racial discrimination and non-discrimination. Yet this contest of ideas is informed by the fact that public discourse on women's rights in the Australian polity is already limited by a gendered bias, typical of Western liberal democracies. Further complicating a more nuanced debate is the relatively diminished status of women's rights in international law: the prohibition against sexual discrimination is neither as developed, nor as valued, as the prohibition against racial discrimination.¹ Indeed, in international law, 'culture' frequently trumps women's rights 'in a way that wouldn't be tolerated in other areas.'²

But international law must evolve to better respond to complex situations taking place around the world. Difficult questions – as always – are emerging about the best way to apply abstract human rights principles to concrete situations. As these situations develop, as in the Intervention, international committees are forced to clarify further the meaning of, and relationship between, conventions, recommendations and general comments. The *United Nations Declaration on the Rights of Indigenous Peoples*, for example, appreciates the serious challenges facing Indigenous women, explicitly providing that states must take measures, together with Indigenous peoples, to ensure that Indigenous women enjoy full protection

against all forms of violence and discrimination.³ The clear concession in the Declaration to the serious problem of violence faced by Aboriginal women is important to counter aggressive cultural relativism and stock standard narratives of colonisation that can work against the effective articulation of women's rights. It is important that Committees such as the Committee on the Elimination of All Forms of Discrimination against Women ('CEDAW') and the Committee on the Elimination of Racial Discrimination ('CERD') understand the importance of an intersectional approach of gender and race in carrying out their work.⁴

This article focuses on 'special measures' under the *International Convention on the Elimination of all Forms of Racial Discrimination* ('ICERD') to illustrate the complexity of abstract principles in the context of concrete situations such as the Intervention. The application of this principle is troubling given the tension between women's rights and collective rights, or non-discrimination and racial discrimination. Part I is a general explanation of non-discrimination, Part II explains substantive equality, Part III considers special measures and consent. Part IV reveals the complexity and ambiguity surrounding the operational aspects of special measures. The author's position is that Australia is in breach of its obligations under CERD and questions the motives driving the Howard Government in implementing the Intervention, particularly the far reaching measures taken to ostensibly address the issues of violence and abuse raised in the *Little Children are Sacred Report*. Even so, the Intervention raises important questions for international lawyers about the intersection of CEDAW and CERD, the timing of special measures and the need for further clarification as concrete situations reveal operational problems in the application of international human rights law.

PART I: NON-DISCRIMINATION IN INTERNATIONAL LAW

The Prescribed Areas People Alliance in the Northern Territory has brought proceedings before CERD, arguing that certain Intervention measures put the Australian Government in breach of its obligations under ICERD.

Indigenous rights activists and human rights lawyers have applied sustained pressure on the Federal Government to address racially discriminatory aspects of the Intervention measures. The Australian Human Rights Commission ('AHRC') has stated that it supports the aims of the legislation but that its objectives must be consistent with fundamental human rights, in particular the right to racial equality.⁶ Indeed, much of the Indigenous protest against the Intervention has been focused upon its racially discriminatory nature.

Non-discrimination is a fundamental principle of the international human rights law system. The importance of non-discrimination as a legal principle is enshrined in the *Charter of the United Nations*, which expressly encourages states to respect human rights and fundamental freedoms for all 'without distinction as to race, sex, language or religion'.⁶ It is central to ICERD, CEDAW and is enumerated in the *International Covenant on Economic, Social Cultural Rights*.⁷ Article 1(1) of ICERD, for instance, defines racial discrimination as:

any distinction, exclusion, restriction or preference based on **race, colour, descent, or national or ethnic origin** which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

But CEDAW defines discrimination against *women* as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by **women**, irrespective of their marital status, on a basis of equality of **men and women** of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

It can be seen from these disconnected definitions that, traditionally, international law has developed a fractured conception of 'non-discrimination'. The division between these instruments has located the principle squarely within two competing, highly specific contexts: race and gender. In the context of the Intervention, concern seems to revolve around the axis of race. Indeed, it seems that more subtle issues of gendered discrimination have largely fallen off the radar.

PART II: SUBSTANTIVE VS FORMAL EQUALITY

Concerned more with substantive rather than formal equality, international law permits states to treat unequally those who are unequal. So, while formal equality requires that all people be treated identically in all circumstances,

substantive equality recognises that all people are *not* equal. That is, identical treatment is not always an effective path towards achieving meaningful equality. Consequently states are permitted to implement policies that may appear discriminatory on their face. International law adopts this approach because there are situations where, due to particular circumstances of history, politics or economics, states may need to pursue a regime of 'unequal' treatment for unequal matters. But while equality does not require all people to be treated the same in all circumstances, different treatment must be

proportionate to concrete individual circumstances. In order to be legitimate, different treatment must be reasonable and not arbitrary and the onus of showing that particular distinctions are justifiable is on those who make them.⁸

Judge Tanaka, in the International Court of Justice decision *South West Africa Case (Second Phase)*, put the matter more forcefully, arguing that treating 'unequal matters differently according to their inequality is not only permitted but required'.⁹ So, where distinctions are reasonable and proportionate, states may legitimately pursue policies of differential treatment.

As a matter of race, it is an established principle of ICERD that a state may take action over a sustained period of time to correct historical discrimination; this principle is also incorporated into the Australian legal system through the *Racial Discrimination Act 1975* (Cth) ('RDA'). ICERD is a powerful tool for Indigenous peoples in asserting and protecting their collective rights. It provides a benchmark by which advocates can engage their respective states, providing a measure by which Indigenous people can measure domestic laws, policies and programs in relation to internationally agreed minimum standards. There are two necessary elements that a state must fulfil in order to legitimately differentiate between groups on the basis of race: it may adopt 'special measures', but it must do so with the *consent* of the relevant group.

PART III: SPECIAL MEASURES AND CONSENT

ICERD explicitly provides for differential treatment between groups by way of special measures. Motivated by the need to remedy the impact of past racial discrimination upon on a community, Article 1(4) states that:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such

measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.¹⁰

As can be seen from the above text, ICERD does not construct special measures as *justified* racial discrimination; rather, where they meet all the requisite elements, special measures are not racial discrimination *at all*. Indeed, Article 2(2) calls upon states, 'when the circumstances so warrant', to take 'in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals'. According to CERD, this is intended to provide express recognition of the special needs of minority groups – including Indigenous populations – within states; as a consequence of the diverse composition of many societies,

[a]ttention must be paid to the socio-economic and political situation of these groups in order to ensure that their development in the social, economic and cultural spheres takes place on an equal footing with that of the general population.¹¹

Domestically, the High Court said in *Gerhardy v Brown*, 'formal equality before the law is insufficient to eliminate all forms of racial discrimination... formal equality must yield on occasions to achieve... genuine, effective equality.'¹² Importantly, though, special measures must be temporary in their operation; the measures cease to be permissible once they have achieved their stated objective. The Court explained the circumstances required for the special measures to be legitimate:

- The special measure must confer a benefit on some or all members of a class;
- Membership of this class must be based on race, colour, descent or national or ethnic origin;
- The special measure must be for the sole purpose of securing adequate advancement of the beneficiaries so that they may enjoy and exercise equally with others their human rights and fundamental freedoms;
- The protection given by special measures must be necessary so that its beneficiaries may enjoy and exercise equally with others their human rights and fundamental freedoms.

A further important consideration is the wishes of the members of the particular group. In referring to a report about alcohol use in Aboriginal communities, Brennan J stated in *Gerhardy v Brown*:

The wishes of the beneficiaries of the measure are of great importance (perhaps essential) in determining whether a

measure is taken for the purpose of securing their advancement. In the Alcohol Report, Commissioner Antonios concluded: alcohol restrictions imposed upon aboriginal groups as a result of government policies which are incompatible with the policy of the community will not be special measures.

PART IV: AMBIGUITY IN INTERNATIONAL LAW

It is important to note that the requirement for consent and full participation in the design of special measures is not unambiguous or settled. Current CERD discussions about the drafting of a General Comment, for example, reveal the need for further clarification in relation to special measures. This indicates a slow pattern of change within current understandings of non-discrimination and rights protection at international law. Reflecting a commitment to an intersectional approach, CERD has also discussed the need for a General Comment specifically aimed at protecting those needs particular to women. Discussions such as these highlight the different constructions of 'non-discrimination' in ICERD and CEDAW and that women's needs may sometimes 'fall through the cracks'. That is, given their different needs and experiences, full protection of women's rights may require some state-sanctioned measures that are incompatible with full protection of men's rights. General Recommendation 25, for example, provides that, when considering forms of racial discrimination, CERD will

integrate gender perspectives, incorporate gender analysis, and encourage the use of gender-inclusive language in its sessional working methods, including its review of reports submitted by States parties, concluding observations, early warning mechanisms and urgent action procedures, and general recommendations.

Increasingly, the Committee recognises that 'racial discrimination does not always affect women and men equally or in the same way'. Importantly, such discrimination 'will often escape detection if there is no explicit recognition or acknowledgement of the different life experiences of women and men, in areas of both public and private life.'¹³ This is particularly interesting in the context of current questions about the timing of consultation, and the implementation of special measures, under the Intervention regime. This issue is not clear cut: how can the state carry out consultation consistently not only with ICERD, but also with the aims pursued by CEDAW in a crisis situation? As the AHRC has noted, while consultation is important, in the context of the Intervention, the rights of children and the rights of adults may sometimes differ, and 'this raises complex issues in relation to consent to special measures'.¹⁴

CERD generally requires that consultation occur at the *time* that special measures are applied; but the Committee does allow states a 'certain degree of latitude' because 'over-guidance could cross the line of State responsibilities'. We know that consent is an important element of special measures. But we need to examine the role of consent within the particular circumstances of a crisis situation, where the measures proposed will have vastly different impacts on male and female members of a 'racial group'. A central question for CERD is this: what happens where men and women have differing levels of power to *grant* consent to special measures? What happens where there is evidence of entrenched, unchecked, systemic violence by men against women and their children? For women, it may be that equality in this situation can only be achieved *after* the proposed measures have been implemented. In this regard, CERD has noted that the issue of appropriate timing for community consultation needs to be much further elaborated.

CONCLUSION

If anything, the complex interaction between conflicting rights, which has strongly emerged in discussions about the Intervention, is common to human rights globally and, in fact, to legal systems daily. The Australian legal system, in its current form, is ill-equipped to properly address some of these conflicts. Equally unsatisfactory is the dearth of discussion about this relationship at the supra-national level; international law and international bodies must better elucidate the intersectional nature of human rights protection. In the mean time, because of the doctrine of state sovereignty, it is likely that these bodies will continue defer to individual states in constructing this complex relationship. This means that we must consider ways to deal with ambiguities and conflicts between rights at a domestic level. In Australia, discussion about the proposed national charter of human rights may be helpful in this regard. An equality provision, alongside a non-discrimination provision, would certainly provide a powerful mechanism to balance potential clashes between the rights of Indigenous men and rights of Indigenous women. Indeed it would place any future conflict within a rights framework, thereby reducing scope for divisive and simplistic assertions about Western feminism trumping collective rights.

The Intervention gives rise to some very important, urgent questions about proper, balanced, *equal* protection of human rights. The answers to these questions are not easy; as with the interpretation of any law, conflicts between rights appear most clearly in the context of competing interests between different individuals. Discussions about

the Intervention have the potential to shift the direction of human rights discourse about Indigenous politics. With closer attention, and a more nuanced approach, it may yet open up the narrative of Indigenous rights to allow for a proper consideration of the rights of women and children in a way that has never before been seen in Indigenous and mainstream Australian public debate. As well as influencing the development of law and policy, a more balanced discussion would reinforce the importance of critique and dissent as fundamental to the protection of human rights of all Indigenous men and women. The current concerns about the relationship between ICERD and CEDAW, women's rights and collective rights, consent and special measures are complex. But together they represent a maturing approach to human rights discussion in Australia.

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- 1 Hilary Charlesworth, 'Martha Nussbaum's Feminist Internationalism' (2000) 111 *Ethics* 66.
- 2 *Ibid.*
- 3 Article 22, Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (2007).
- 4 Committee on the Elimination of Racial Discrimination, General Recommendation 25, Gender Related Dimensions of Racial Discrimination (Fifty-sixth session, 2000), U.N. Doc. A/55/18, annex V at 152 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HR/GEN/1/Rev.6 at 214 (2003).
- 5 See for example Australian Human Rights Commission, 'Racial Discrimination Act is a vital human rights safeguard' (Press Release, 8 August 2007) at <http://www.hreoc.gov.au/about/media/media_releases/2007/53_07.html>; Tom Calma, 'Can the End Ever Justify the Means? Achieving Equality for Aboriginal & Torres Strait Islander Peoples and the Northern Territory Intervention', Speech delivered at the 2007 Don Dunstan Oration, Adelaide, South Australia, 18 September 2007).
- 6 United Nations Charter Art 1(3).
- 7 Arts 2(3) and 3.
- 8 Warwick McKean, *Equality and Discrimination under International Law* (1983) 82.
- 9 South West Africa Cases (Second Phase) [1966] ICJ Rep 305 (Tanaka J).
- 10 This Article is incorporated into Australian law by s 8 *Racial Discrimination Act 1975* (Cth).
- 11 United Nations Manual on Human Rights Reporting Under Six Major International Human Rights Instruments (1997) HR/PUB/91/1 (Rev. 1) 277.
- 12 Gerhardy v Brown (1985) 159 CLR 70, 128-29 (Brennan J).
- 13 General Recommendation 25, above n 4.
- 14 Submission of the Human Rights and Equal Opportunity Commission to the Senate Legal and Constitutional Committee on the Northern Territory National Emergency Response Legislation 10 August 2007 [22] at <http://www.hreoc.gov.au/legal/submissions/2007/NTNER_Measures20070810.html>.